In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1795

PETER P. MASCAVAGE, JR., PETITIONER

v.

JAMES R. SCHLESINGER, ET AL.

AND

DEBORAH M. RAINVILLE, PETITIONER

v.

CAPTAIN H. B. LEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

The principal issue in this case is whether a federal district court may enjoin a pending court-martial on the basis of the accused serviceman's contention that the court-martial has no jurisdiction under *O'Callahan* v. *Parker*, 395 U.S. 258, because the offense charged is not service connected.

STATEMENT

1. *Mascavage* v. *Schlesinger*

The Navy preferred court-martial charges against Mascavage, an enlisted man in the United States Navy, alleging that he possessed and used marijuana while off

base and sold marijuana to another enlisted person, in violation of various articles of the Uniform Code of Military Justice ("U.C.M.J."). Mascavage filed in the United States District Court for the District of Columbia a complaint seeking *habeas corpus* relief, an injunction against his trial by court-martial and a judgment declaring the trial unlawful. The complaint was accompanied by a motion for a preliminary injunction requiring his immediate release from Naval service.[1] He contended that the alleged offenses were not subject to court-martial jurisdiction under *O'Callahan* v. *Parker*, 395 U.S. 258, because they were not "service connected."

The district court dismissed the suit, ruling that it lacked jurisdiction because of failure to exhaust administrative remedies or to allege irreparable injury. As the court observed (Pet. App. B, A4), "no attempt [had] been made to present this issue [of court-martial jurisdiction] to the military."

Shortly after the dismissal, Mascavage moved the court martial to dismiss the charges. That motion was denied, and Mascavage petitioned the United States Court of Military Appeals for a writ of prohibition against further court-martial proceedings. The court denied the petition (Pet. App. D).

On March 1, 1974, the court of appeals affirmed the judgment of the district court in a *per curiam* opinion and order (Pet. App. A).

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[1] Mascavage's period of active service was originally due to expire on January 29, 1973. Because of the pending charges, he was being held in the service beyond that date at the time he sought relief in the district court. See Article 2(1), U.C.M.J., 10 U.S.C. 802(1).

The request for *habeas corpus* relief was later withdrawn. In his original complaint Mascavage sought "such other and proper relief" as the court deemed equitable. On July 23, 1973, Mascavage submitted to his commanding officer a request for release from active duty on leave without pay pending the outcome of the instant suit.

On April 2, 1974, prior to the filing of this petition for a writ of certiorari, Mascavage pleaded guilty to two specifications of possession and use of marijuana, and the remaining charges were dismissed. He was sentenced to reduction to the lowest enlisted grade and fined $500.

2. *Rainville* v. *Lee*

Deborah Rainville, also an enlisted person in the United States Navy, was charged with violations of the U.C.M.J. involving her alleged possession and use of marijuana and sale of marijuana to another enlisted person. She filed a similar suit in the district court seeking injunctive and declaratory relief and a motion for a preliminary injunction, alleging lack of military jurisdiction.[2] She also moved the court-martial to dismiss the charges for lack of jurisdiction, and the motion was denied. The district court then dismissed the complaint for injunctive and declaratory relief "due to the plaintiff's failure to exhaust military remedies" (Pet. App. C) and denied as moot the motion for a preliminary injunction.

Rainville petitioned the Court of Military Appeals for a writ of prohibition, and the court denied that petition, ruling that the alleged offenses were service-connected under *O'Callahan* (Pet. App. E).

Subsequently, the court of appeals -- which had consolidated her appeal with that of Mascavage -- affirmed the dismissal of Rainville's complaint for lack of jurisdiction (Pet. App. A).

Following a trial by court-martial, Rainville was convicted of possession, use, and sale of marijuana and was sentenced to $150 forfeiture for six months (which the convening authority commuted to a $675 fine), reduction in grade, and a reprimand.

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[2]Rainville, whose term of duty was not to expire until January 8, 1974, did not seek *habeas corpus* relief.

DISCUSSION

1. The principal issue petitioners raise is whether a district court may enjoin a pending court-martial where the jurisdiction of the court-martial is challenged on the ground that the offense is not "service connected" under *O'Callahan*. The same issue is presented in *Schlesinger* v. *Councilman*, No. 73-662, certiorari granted, 414 U.S. 1111, and a related jurisdictional issue in *McLucas* v. *DeChamplain*, No. 73-1346, question of jurisdiction postponed to hearing on the merits, June 24, 1974.

Here, as in *Councilman*, petitioners failed to exhaust their remedies within the military justice system when they sought relief in the district court. For the reasons developed in our brief on the jurisdictional issues in *Councilman* (pp. 9-19), the failure to exhaust those remedies barred the district court from interfering with the court-martial. Furthermore, for the reasons also developed in that brief and in our brief in *DeChamplain*,[3] it would be improper for the district court to enjoin a pending court-martial prosecution.

Finally, at least with respect to petitioner Rainville's case, the district court properly declined to act for the additional reason that it had no jurisdiction to review court-martial proceedings other than by writ of *habeas corpus*. Article 76 of the U.C.M.J., 10 U.S.C. 876, makes the action of courts-martial conclusive upon civilian courts except insofar as the Constitution, Article I, Section 9, requires the allowance of *habeas corpus*. See our brief on the jurisdictional issue in *Councilman* (pp. 6-8) and our supplemental brief in *Secretary of the Navy* v. *Avrech*, No. 72-1713, decided July 8, 1974.[4]

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[3]We are furnishing counsel for petitioners with these briefs and also with our supplemental brief in *Secretary of the Navy* v. *Avrech*, mentioned in the text.

[4]See note 3, *supra*.

Since the Court will have full opportunity to consider the jurisdictional issues in *Councilman* and *DeChampdini* there is no occasion for it to hear this case together with those cases. Instead, it should defer action on this petition until it has decided those cases.

2. Petitioners also contend that the offenses with which they were charged--the off-base possession, use and sale of marijuana--are not "service connected" within the meaning of *O'Callahan*, so that the court-martial had no jurisdiction to try them. A related question is presented in *Councilman*, where the off-base possession was by a commissioned officer who also sold the drug to an enlisted man. If the Court agrees with our submission in *Councilman* that the district court has no jurisdiction to enjoin a court-martial, there is no occasion to reach the substantive issue either there or here. If it disagrees with us on the jurisdictional issue, its decision on the substantive issue in *Councilman* should aid in resolving the substantive issue here, which the lower courts did not reach.

In the circumstances, we do not think it would be appropriate for this Court to consider the substantive issue here together with *Councilman*. Rather, we suggest that it should hold this case pending its decision in *Councilman*, and if it reaches the substantive issues in *Councilman*, then deal with the substantive issue here in accordance with that decision. Such disposition might be to deny certiorari, to remand to the district court to reconsider in the light of that case, or for the Court itself then to decide the issue.

CONCLUSION

The Court should hold this petition pending the decisions in *Councilman* and *DeChamplain*, and then dispose of it in accordance with those decisions.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

DOJ-1974-09